SARAWAK ENERGY BERHAD

v.

MINISTER OF HUMAN RESOURCES & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[JUDICIAL REVIEW NO: KCH-13JR-2/4-2013]
14 NOVEMBER 2013

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for - Reference by Minister to Industrial Court - Application to quash reference to Industrial Court - Whether wrong party cited by Minister - Whether Minister should determine rightful employer - Industrial Relations Act 1967, s. 29*

COMPANY LAW: *Separate legal entities - Holding and subsidiary companies - Whether lines between two companies blurred - Whether holding company could terminate employee of subsidiary company - Whether corporate veil should be lifted*

A representation was made to the Minister of Human Resources ('Minister') by one Hii King who alleged that his services had been unfairly terminated. Following the representation, an Industrial Court case was registered. In the representation, the Minister cited the applicant ('Sarawak Energy') as the employer of Hii King ('second respondent'). Sarawak Energy then filed an application for an order of *certiorari* to quash the referral on the ground that the wrong party was cited in the Industrial Court and that the Minister's act in making the reference was tainted with illegality, irrationality or procedural impropriety. Sarawak Energy argued that the second respondent was never their employee but was an employee of Syarikat SESCO. In its affidavit in support, Sarawak Energy deposed that it owned ordinary shares in SESCO whilst the preference shares were in the hands of the State Financial Secretary Incorporated. On the contrary, the second respondent, in his affidavit of opposition, exhibited a search from the Companies Commission of Malaysia which showed that SESCO was a wholly owned subsidiary of Sarawak Energy. It was submitted that pay slips, the letter informing him of a domestic enquiry and the letter of termination of employment, were all issued by Sarawak Energy. In the affidavit in reply, although

Sarawak Energy admitted that SESCO was one of its seven subsidiaries, it stressed that all were separate and distinct from it as the holding company. The second respondent, however, submitted that pursuant to s. 29 of the Industrial Relations Act 1967 ('Act'), the Industrial Court had the power to add SESCO as a respondent in the Industrial Court action. The issues that arose for determination *inter alia* were (i) whether a subsidiary was a separate legal entity from its holding company; (ii) whether the veil of incorporation should be lifted; and (iii) whether the decision of the minister in making the reference by citing Sarawak Energy as a party ought to be quashed.

Held (dismissing application with costs):

(1) Although the second respondent was employed by SESCO, the lines between Sarawak Energy and SESCO had been seriously blurred. Porous barriers and interchangeability of the persona of SESCO and Sarawak Energy in regard to the employment and dismissal of the second respondent was obvious enough that the second respondent was employed by one but dismissed by another. Even though a subsidiary was a separate legal entity from its parent company, it was open to the court in appropriate circumstances to lift the veil of incorporation when justice of the case demands it. (paras 6 & 7)

(2) Since Sarawak Energy managed the human resources of its subsidiaries, according to the principle of employment law, it was the right of an employer to hire and to fire. By issuing the letter of termination and rejecting his appeal against termination, Sarawak Energy had manifested itself as the second respondent's employer. The Minister therefore could not be faulted to issue the reference, citing Sarawak Energy as a party. (para 10)

(3) The Minister's role was to ascertain based on facts placed before him, whether the representation raised serious questions of fact and law for adjudication. The Minister's discretion was absolute. As such, Sarawak Energy's issuance of the notice to show cause and the letter of termination were sufficient justification for the exercise of that discretion. The issue of who was the rightful employer should be a question of fact to be decided by the Industrial Court. (para 10)

(4) Although the Industrial Court had the powers pursuant to s. 29 of the Act to add a party to its proceedings, the adding of SESCO would not turn the representation against Sarawak Energy into a representation against SESCO. The representation would still stand but it would ensure that the right party would be made liable for the dismissal of the second respondent in the Industrial Court proceeding. The better way would be for Sarawak Energy to make an application to be struck out in the Industrial Court. There was no cause to impugn the decision of the Minister in making the reference. It was neither irrational nor illegal and did not deserve to be quashed at all. (paras 11 & 12)

Case(s) referred to:
Adams v. Cape Industries PLC [1990] Ch 433 ***(refd)***
Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal [1997] 1 CLJ 665 CA ***(refd)***
Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***
Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***
Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd [1980] 1 LNS 47 FC ***(refd)***
Prest v. Petrodel Resources Ltd & Ors [2013] UKSC 34 ***(refd)***
Woolfson v. Strathclyde Regional Council [1978] UKHL 5 ***(refd)***

Legislation referred to:
Income Tax Act 1967, s. 83(3)
Industrial Relations Act 1967, ss. 20(2), 29, 54(2)

For the plaintiff - Sim Hui Chuang; M/s Reddi & Co; Advocs
For the 1st respondent - Mohd Taufik Mohd Yusoff; SFC
For the 2nd respondent - Yap Yau Sin; M/s Wan Junaidi & Co; Advocs

Reported by Sandra Gabriel

JUDGMENT

Rhodzariah Bujang J:

[1] An Industrial Court case is pending between Sarawak Energy Bhd ("Sarawak Energy" for short) and one Hii King. The Industrial Court case was registered following a representation

made by Hii King to the Minister of Human Resources ("the Minister" for short), alleging that his services as a clerk had been unfairly terminated and he seeks reinstatement of the same.

[2] Stating the obvious, in his referral to the Industrial Court, the Minister has cited Sarawak Energy as the employer of Hii King and they, in turn, have filed this application for an order of *certiorari* to quash the said referral on the ground that the wrong party is being cited in the Industrial Court. Hii King was never their employee, contended Sarawak Energy as Syarikat SESCO Bhd ("SESCO" for short) was and the two of them are separate legal entities. Thus, they concluded, the Minister's act in making that reference, was tainted with "illegality and/or irrationality and/or procedural impropriety" for they could not, having never employed him and if a case of unfair dismissal were made out in the Industrial Court, reinstate Hii King to his former employment as required by s. 20 of the Industrial Relations Act 1967 ("the said act").

[3] In the affidavit in support of Sarawak Energy's General Manager, Stephanie Gae Chin, Hii King's letter of appointment from SESCO dated 24 June 2005 was exhibited. She further deposed that Sarawak Energy owns ordinary shares in SESCO whilst the preference shares are in the hands of the state financial secretary incorporated. No documentary evidence was exhibited by her to prove the said contentation but Mr Hii King did, in his affidavit in opposition, exhibit a search from the Companies Commission of Malaysia ("HK-8") which shows that SESCO is a wholly owned subsidiary of Sarawak Energy. He had also exhibited notifications of changes in salary dated 18 November 2009 and 11 October 2010 as well as his pay slip for 24 October 2012 issued by Sarawak Energy. He claimed in his affidavit that all his pay slips had been issued by the said company though only that one pay slip was exhibited. What is even more damaging to Sarawak Energy is that the letter informing him of a domestic inquiry and a letter terminating his employment dated 14 November 2012 also came from Sarawak Energy ("exh. HK-6"). Likewise another letter dated 16 January 2013 dismissing his appeal against the termination.

[4] The then Minister, Datuk Seri Dr S Subramaniam too filed an affidavit in opposition, relying also on the letter of termination issued by Sarawak Energy for his decision to cite them in the reference and professing to be unaware of a document made under s. 83(3) of the Income Tax Act 1967 where a notification of the cessation of Hii King's employment with SESCO was made as it was never brought up during a settlement conference held by the Industrial Relations Department of Sarawak on 25 January 2013. He appended to his affidavit three documents, all from Sarawak Energy addressed to Hii King – the show cause letter, notice of domestic inquiry and the dismissal (termination) letter which I have referred to earlier.

[5] In her affidavit in reply, Stephanie Gae Chin admitted that SESCO is one of Sarawak Energy's seven subsidiaries but stressed that all are separate and distinct from it, as the holding company. She explained that Sarawak Energy and its subsidiaries are not just involved in utilities but manufacturing, engineering and other services and they all come under what is known as the Sarawak Energy Berhad group. It is this group which deals with the management of human resources of all its members but the individual employments remained with the subsidiaries, she asserted. That was why, she further added, the letters informing Hii King of the domestic inquiry and the letter of termination came from the Sarawak Energy Berhad group. In fact, she pointed out that in Hii King's payslip for 24 October 2012 "Sarawak Energy Berhad group" was stated therein. It was also pointed out by her and Sarawak Energy's counsel at the hearing before me that in the memorandum by the Director of Industrial Relations Malaysia informing Hii King of the failure of the settlement conference, the title in Bahasa Malaysia is "Laporan Akhir Mengenai Pembuangan Kerja Hii King oleh Syarikat SESCO Bhd pada 14 November 2012". (emphasis added).

[6] What all these affidavit evidence and documentary exhibits proved to me is, although Hii King was employed by SESCO, over the years since his appointment with SESCO in 2005 until his dismissal in 2012, in relation to this case, the lines between the two companies have been seriously blurred, probably due to the assumption of the management of the human resources of its subsidiaries by Sarawak Energy as explained by Stephanie Gae Chin. Porous barriers and interchangeability of the persona of

SESCO and Sarawak Energy with regards to the employment/ dismissal of Hii King seems obvious enough given that he was employed by one but dismissed by the other.

[7] Although I could not but appreciate the entrenched company law principle that a company, even a subsidiary is a separate legal entity from its parent company, it is also open to the court, in appropriate circumstances, to lift the veil of incorporation. But, in this case I should not, submitted Sarawak Energy's counsel, Mr Sim Hui Chuang, citing a very recent English Supreme Court case of *Prest v. Petrodel Resources Ltd & Ors* [2013] UKSC 34 and an earlier Court of Appeal case of *Adams v. Cape Industries PLC* [1990] Ch 433. In the latter cited case, Slade LJ held at p. 536 that:

> ... save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law to be treated as separate legal entities with all the rights and liabilities which would normally attached to separate legal entities.

[8] Mr Sim Hui Chuang also quoted Lord Sumption in the former case where His Lordship said, quoting from *Woolfson v. Strathclyde* that the "corporate veil could be disregarded only in cases where it was being used for a deliberately dishonest purpose ...". In the same case Lord Neuberger was reported to have said as follows:

> 81. Having read what Lord Sumption says in his judgment, especially in paragraphs 17, 18, 27, 28, 34 and 35, I am persuaded by his formulation in paragraph 35, namely that the doctrine should only be invoked where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control".

[9] Although I would not go so far as saying that Sarawak Energy is shielding or using this company law doctrine for a dishonest purpose, I am firstly mindful of the fact that what I am dealing with here is a piece of legislation which aims to promote

social justice for employees and employers. Secondly, against the weight of those English cases, our own Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 have decided on the very issue of a subsidiary as a separate entity from its holding company and the lifting of the veil of incorporation, also in relation to employment law. Gopal Sri Ram JCA held, following Salleh Abas FJ's decision in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 that when the justice of the case so demands, the court would be quite willing to lift the veil of incorporation. What was said by Salleh Abas FJ (as His Lordship then was) in relation to this issue was quoted in the Court of Appeal's judgment and given the endorsement made by the Court of Appeal, it is an authority that binds me in this case. I am now moved too, in turn, also quote at length from it below:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Corporation; Re FG (Films) Limited;* and *Firestone Tyre & Rubber Co v. Llewelyn*. Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, page 213, said that the courts:
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> > are coming to recognize the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* (1937) 58 Ll.L.R. 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity ... in name alone and probably for the purposes of taxation'. In another case, *Spittle v. Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 percent of its shares. A licensing authority in exercise of its discretion has been held entitled to have

> regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at page 202) ... A good example of this *Bird & Co v. Thos. Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to 'Thos Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of *Thos. Cook & Son (Bankers) Ltd* by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet*.

[10] Although I noted and appreciate Mr Sim Hui Chuang's point highlighted in his written submission in reply for Sarawak Energy that the facts in the cited case shows that the hotel and the restaurant were operated, inter-dependent and there was unity of establishment between them, I cannot but help to draw the same analogy here because as deposed by Stephanie Gae Chin, Sarawak Energy manages the human resources of its subsidiaries. This brings me to another entrenched legal principle, this time in employment law and that it is the right of an employer to hire and fire. Granted that Hii King was hired by SESCO, but he was fired by Sarawak Energy. By issuing that letter of termination and rejecting his appeal against his termination, Sarawak Energy has manifested itself as his employer. The Minister therefore cannot be faulted, in the face of such clear documentary evidence, to issue the reference, citing it as a party. As Mr Mohd Taufik, for the Minister, has submitted, citing the Court of Appeal's case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal* [1997] 1 CLJ 665, the Minister's role is "limited to ascertaining, whether on the facts and material placed before him, the representation raise serious questions of fact or law calling for adjudication" and he should exercise his discretion based on what he has before him. That discretion is, according to the Court of Appeal's decision in *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227, absolute. Sarawak Energy's issuance of the notice to show cause and the letter of termination are in my view sufficient justification for the exercise of that discretion. The issue of who is the rightful employer should be a question of fact to be decided, as submitted by Mr Mohd Taufik, by the Industrial Court. I would also record my agreement with Mr Mohd Taufik that no adverse inference (as contended by

Sarawak Energy) should be drawn from the failure of the Minister to exhibit the report made by the Director General of Industrial Relations to the Minister because under s. 54(2) of the said act, no evidence shall be given of any proceeding before the Director General under s. 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference. He has cited a Federal Court decision in respect of the interpretation of that section which extended the exclusion of such evidence not just from the Industrial Court but the other courts as well. That case is *Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd* [1980] 1 LNS 47; [1980] 2 MLJ 248 and the relevant pp. are 250 to 251.

[11] Hii King's counsel, Mr Yap Yau Sin has further submitted to me the power the Industrial Court has under s. 29 of the said act, to *inter alia*, add a party to the proceeding before it and that in fact his client is considering adding SESCO as a co-respondent in the Industrial Court action. Citing the same decision in *Hotel Jaya Puri Bhd*'s case (*supra*), he highlighted the judgment of the court that the power by the Industrial Court to add a party to the proceeding is not limited to just adding a claimant, but also a respondent. I agree that the Industrial Court has such a power by the clear provision of the law and with respect to Mr Sim Hui Chuang's written submission in reply, the adding of SESCO, if made, will not turn the representation against Sarawak Energy into a representation against SESCO. The representation still stands as it is but what it does is to ensure that the right party would be made liable for the dismissal of Hii King in the Industrial Court proceeding.

[12] I also observed the clear wordings of the said s. 29 that a party can be "joined" or "struck" out and I cannot help but think that rather than this application, the better way would be for Sarawak Energy to make an application to be struck out in the Industrial Court, that being the trial court for it is in full possession of the evidence and is therefore in a better position to appreciate whether the right employer is before it. Be that as it may, I would reiterate that I do not see any cause to impugn the decision of the Minister in making the reference. It was neither irrational nor illegal and does not deserve to be quashed at all. Sarawak Energy's application is therefore dismissed and I do so with cost of RM5,000 to each of the respondents.